LIBRARY
SUPREME COURT, U. S.

Office-Supreme Court, U.S.
FILED
APR 13 1966
JOHN F. DAVIS, CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1965

No. 1121

MORTIMER L. SCHULTZ,

Petitioner,

vs.

STATE OF NEW JERSEY,

Respondent.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

BRENDAN T. BYRNE,
County Prosecutor of Essex County,
Attorney for Respondent,
Court House,
Newark 2, New Jersey.

BARRY H. EVENCHICK,
Assistant County Prosecutor,
Of Counsel and on the Brief.

Adams Press Corp., 11 Commerce Street, Newark, N. J.—Market 3-8611-12

TABLE OF CONTENTS

	PAGE
COUNTER-STATEMENT OF QUESTIONS INVOLVED	1
COUNTER-STATEMENT OF THE CASE	2
REASONS WHY WRIT OF CERTIORARI SHOULD NOT BE GRANTED	11
POINT I—The decision of the Supreme Court of New Jersey complies fully with the rule of Griffin v. California and neither modifies nor misinterprets existing federal constitutional law	11
POINT II—The present case is not an appropriate one for the issuance of a writ of certiorari because there was a supplemental charge offered by the court which withdrew the earlier comment regarding the failure to testify and replaced it with one which equalled and may have surpassed constitutional requirements	14
POINT III—Defendant's claims that he was the victim of an unlawful search and seizure and that he was improperly denied immunity from prosecution are totally unsupported by the facts	15
CONCLUSION	16

Cases Cited

Griffin v. California, 380 U. S. 609 (1965) 1, 11-14

Malloy v. Hogan, 378 U. S. 1 (1964) 10, 14

Redfield v. United States, 315 F. 2d 76 (9 Cir. 1963) 12, 13

State v. Aviles, 45 N. J. 152 (1965) 11

PAGE

Smith v. United States, 234 F. 2d 385 (5 Cir. 1956)... 12

State v. Corby, 28 N. J. 106 (1958)..... 14

State v. Davis, 45 N. J. 195 (1965)..... 11

State v. Fiorvanti, 46 N. J. 109 (1965)..... 11

State v. Lanzo, 44 N. J. 560 (1965)..... 11

United States v. Curtiss, 330 F. 2d 278 (2 Cir. 1964) 12, 13

United States v. Feinberg, 140 F. 2d 592 (2 Cir. 1944) 13

United States Constitution Cited

Fourth Amendment 15

Fifth Amendment 12, 15

Statute Cited

N.J.S.A. 49:3-16(d) 15

Counter-Statement of Questions Involved

1. Does not the decision of the Supreme Court of New Jersey comply fully with the rule of *Griffin* v. *California* and neither modify nor misinterpret existing federal constitutional law?

2. Should not this Court deny a petition for writ of certiorari where there was a supplemental charge offered by the trial court which withdrew an earlier comment regarding the failure to testify and replaced it with one which equalled and may have surpassed constitutional requirements?

3. Are not defendant's claims that he was the victim of an unlawful search and seizure and that he was improperly denied immunity from prosecution totally unsupported by the facts?

Counter-Statement of the Case

The Grand Jury of Essex County returned 12 indictments containing 74 counts involving various business frauds alleged to have been committed by Mortimer L. Schultz (hereinafter defendant). Trial in the Superior Court, Law Division commenced on May 13, 1964 and concluded on June 16, 1964 at which time the jury announced its verdict of guilty on 67 of 70 counts (4 counts contained in the indictments were dismissed at trial). Defendant was subsequently sentenced to a term of not less than 10 nor more than 20 years in New Jersey State Prison.

Defendant elected to try the case himself. Before the first person was called to the witness stand the court explained to the jury that in the usual criminal case a charge is given at the conclusion of all the testimony. However, the court advised that because the case which was about to be tried involved multiple indictments with many counts and would probably take four weeks to try, preliminary instruction in the nature of a charge was in order (May 14th, Tr. 11).* The charge which followed, and which consumed six pages in the record, briefly explained the function and the responsibility of the jury.

The first witness to testify on behalf of the State was one Peter Muto, a self-employed electronics consultant. He said that he had purchased four units of "San-Mac Associates" for $7,000 and that in return for his money he had received "an assignment of a limited partnership interest from Mr. Schultz" (May 14th, Tr. 19-23). On cross-examination defendant asked the witness whether he was self-employed. The answer was in the affirmative, and defend-

* Dated references are to the trial transcript.

ant then asked, "from whom did you purchase the business?" The assistant prosecutor objected to the question, and the court asked defendant for an offer of proof. The latter's next words were, "he bought it from Mr. Altenberger" (May 14th, Tr. 26-25). An objection by the State to that comment was sustained.

While cross-examining a witness named Calleo, defendant asked whether one Edwards was the witness's business partner. After the response, defendant asked, "and isn't it a fact, Mr. Calleo, that I put Mr. Edwards in business in Maplewood and capitalized the endeavor to the extent of $20,000 of my own money?" (May 14th, Tr. 55-16 to 18). The State's objection to the question was sustained.

A witness named Humrich testified that he had paid $2500 for a half unit in Wiss Building Associates. On cross-examination the witness was asked to explain the notarization on a particular document and the circumstances under which the document was received. He answered that he had "received that with a letter dated January 11, signed by you, Mr. Schultz." Defendant's next words were "it isn't signed by me, sir" (May 20th, Tr. 108-12).

During the cross-examination of witness Marie Hoynack, defendant stated, "in other words, you made the comment that Mr. Hirschfeld was nosey and went through everything" (May 22nd, Tr. 352-18). After objection by the State, the court said, "well, when you get on the witness stand and you are sworn, I will permit you to testify, but I can't let you testify when you are acting as counsel. Reframe your question" (May 22nd, Tr. 352-22 to 25). At a subsequent point in the cross-examination of this witness, defendant showed her S-22, an assignment of a partnership interest, and asked whether she had ever seen it. She said

that she had seen it but had nothing to do with it. The witness further said that it had been shown to her by "Ray White." Defendant asked why the latter would have shown it to the witness. There was an objection by the State, and before the court ruled, defendant stated, "this was prepared by Fox and Schackner" (May 22nd, Tr. 371-16). The objection was sustained.

While defendant was cross-examining one William Mariani, the following question was asked:

> "following that discussion, isn't it a fact, Mr. Mariani, that the conversations went something like this: You would now prefer perhaps to sell your twenty-two units, but since you were counting on an income of roughly $10,000 a year from this investment you wished it to be sold all at once and not piecemeal? Therefore, you instructed me, didn't you, to sell them, but in the meantime to continue the $825 a month, and didn't you then say, 'Make such arrangements as you think are appropriate on the books, like put the certificates in street name and when they are completely sold out, then send me my check for $88,500'? Isn't that what you said"? (May 25th, Tr. 485-21 to Tr. 486-7).

After this "question" the State indicated that it had no objection to the "multi-question." And the court said, "I have no objection to it either, but I would like to have a statement from Mr. Schultz that he intends to go on on the witness stand to contradict this witness" (May 25th, Tr. 486-10 to 13).

Again during cross-examination of Mariani, defendant stated, "you just wanted your money back. You didn't care whether you were a partner, or you didn't care any-

thing about anything. You just wanted your money back now" (May 25th, Tr. 501-19 to 21).

While witness Raymond White was being questioned by the defendant, he was asked to explain the circumstances under which the events described in certain documents had occurred. The State's attorney interjected the comment, "if he knows." Defendant responded, "he does" (May 26th, Tr. 687-11).

At another point in the cross-examination of White, defendant asked this question: "my control of the board of directors of O.B.A. was to the extent of one vote and to the extent that the members of the board saw fit to permit me to control the board. Is that right?" (May 26th, Tr. 699-15 to 18). The court admonished that defendant was asking the witness to draw a conclusion which was properly within the domain of the jury. Subsequently, on recross, defendant asked the witness to explain what happened when he [defendant] tried to fire one Mr. Hirschfeld. The assistant prosecutor asked, "may we know the time of this?" Defendant then answered, "May 29, 1963" (May 26th, Tr. 722-22). The court then asked, "are you testifying or is that a question?" Defendant answer, "I'm leading the witness" (May 26th, Tr. 722-25).

When defendant was cross-examining Milton Albert, the State objected to a question as one calling for a legal conclusion. The objection was sustained and defendant next stated:

> "if your honor please, the mechanics of the closing as I have come to understand them by having dealt in real estate and having always taken the advice of counsel is that at the time of the signing of the contract the equitable rights or title is in the vendee and that the title closing is merely the mechanics." (May 27th, Tr. 827-20 to Tr. 828-1).

To that comment the court replied, "your conclusion in front of the jury is improper and will be stricken. The question is an improper question and it is stricken. Objection sustained."

At a point in the cross-examination of Mr. Albert, defendant asked a question which prompted the assistant prosecutor to say that he did not understand it. Defendant then said, "I am endeavoring to prove that the testimony that on February 14 I sold to Ralph Steinberg a half unit of Wiss and didn't have it available, that in fact on that date I had 470,000 worth of it still unsold" (May 27th, Tr. 851-12 to 16). The court noted, "this is not evidence. This is a matter of proof." Defendant retorted, "but he is an expert, sir, and his own testimony was that accounting is not an exact science and it is possible to take a set of facts—" At this point the court interrupted and said, "you know if you were a lawyer I would bring the gavel down . . . you can't make these speeches in front of the jury where it might prejudice them" (May 27th, Tr. 851-25).

At one point during the cross-examination of an accountant named Grossman, defendant offered this statement:

> "the witness testified your Honor, that his examinations were based upon the indictments and he worked back to the books. These indictments specifically say with intent to defraud. The change of a date from the 1st to the 12th is not an intent to defraud when a half million dollar building winds up where it belongs." (May 28th, Tr. 933-20 to 25, Tr. 934-1).

Once again the court warned defendant:

> "I told you yesterday that if your were going to make speeches in front of the jury, if you were a lawyer

> I would bring the gavel down on you. Now I will start treating you like a lawyer pretty soon. This is improper. We have had side bar conferences in other matters. If there are things that you want to discuss outside the presence of the jury, side bar is open to you as heretofore . . .'' (May 28th, Tr. 934-2 to 9).

At a subsequent point in the cross-examination of Mr. Grossman, defendant asked the witness whether it was correct that a "fee owner" collects a net rent. After objection by the State, Mr. Schultz said:

> "the holder of the deed owns the real estate and the lessee operates the real estate and agrees to pay a fixed rent to the owner of the real estate for the right to operate it. The lessee agrees to pay real estate taxes, insurance and other things as part of his obligation. In the light of what I just stated, wouldn't a failure to pay the taxes on time serve as a lien against the real estate owned by the deed owner in your opinion as an accountant, sir?'' (May 28th, Tr. 939-9 to 17).

Objection to those remarks was sustained.

As witness Sherman Hirschfeld testified on cross-examination, defendant, questioning about a particular check, asked "but . . . if I got the money, it went into my account. When did I cash the check''? The State objected to the question. It was sustained. The next words from defendant were, "he is the one who signed every one of my personal checks,'' (June 1st, Tr. 110-24). Objection was again sustained.

When James L. McKenna, Chief of the Bureau of Securities of the State of New Jersey was under cross-ex-

amination, he was asked by defendant whether the latter was in charge of the Bureau "at the time these things occurred." After the witness gave the date of his appointment Mr. Schultz said, "if it please the Court, sir, there would have to be an inconsistency here. I am indicted for not being registered because I indirectly controlled the registrant" (June 4th, Tr. 32-19 to 22). To this, the court admonished, "do not make any speeches in front of the jury."

During defendant's presentation of direct evidence he called Angelo Mastrangelo to the stand and asked him this question:

> "In connection with the Seaman Brothers transaction, Mr. Mastrangelo, is it not so that about the 15th or 16th there was a discussion in your office whereby the contract would either be taken in this form on the 17th or if not, it was to be taken as a joint venture between members of your firm and Mr. Victor Paul under the following circumstances and conditions: that if O.B.A. could not successfully syndicate the property by, say August of 1963 or whatever date was set in here, being a short date for closing, if you recall, that then your group would take title, but in the event the syndication was successfully performed in time, your group would merely get a fee?" (June 8th, Tr. 56-2 to 13).

After the State's objection to that question was sustained, defendant retorted, "your Honor, I'm endeavoring to lead the witness to state the facts as they occurred." Despite this protestation the court ordered the remark stricken.

A little while later defendant asked this witness, "don't you know as a fact that Seaman Brothers was founded in

1888, is strong and is now merged with Hunt Brothers, and that's not a reasonable answer to say that they had bad financial condition?" (June 8th, Tr. 64-13 to 16). The State's attorney immediately said, "I strenuously object to Mr. Schultz's comments. He'll have an opportunity to testify. And the court's answer was "objection sustained strenuously."

When Sherman Hirschfeld was recalled, this time by the defense, defendant listened to one of his answers and then stated, "your bond, sir, covered honesty not policy . . ." (June 10th, Tr. 154-7). That comment was objected to, and the court sustained the objection admonishing the defendant, I can't have you testify, Mr. Schultz."

Defendant later called one David Schackner to the witness stand and asked him to indicate for whom his firm was acting during the time of a particular event. The answer was, "Office Buildings of America . . ." Said Mr. Schultz, "well, Office Buildings of America is an inanimate object. Somebody had to authorize you, sir" (June 11th, Tr. 8-20). Objection to this comment was sustained, and the court ordered it stricken from the record.

During summation to the jury, the defendant alluded to the fact that he had not taken the witness stand:

> "Have I taken the stand? I could have done nothing but say the facts are true the intent is gone and there is no intent. What else could I say? What else could I explain?" (P10a, P11a).

The jury's deliberations began at 5:05 P.M. on Monday, June 15, 1964. They adjourned at 11:00 P.M. that evening and reconvened at 9:30 A.M. the next day. At 11:00 A. M. on June 6, 1964, the prosecutor requested that the jury cease its deliberations in order that the Court might

withdraw that portion of its charge dealing with defendant's failure to testify. That request was made because of a report in the New York Times of the opinion of the United States Supreme Court in *Malloy* v. *Hogan,* decided June 15, 1964. The jury was ordered to discontinue its deliberations at 11:20 A.M.

At 1:55 P.M. the court charged the jury that its earlier instruction regarding the permissible inference that could be drawn from defendant's failure to testify in his behalf was to be disregarded in every respect and was not to be applied as the law in the case. The court continued:

> "You will consider it as not charged and likewise I instruct you that any and all comments made by the Prosecutor either during the course of the trial or in argument, or in summation in regard to the failure of the defendant to testify, are also stricken and must be disregarded, and I give you the following charge which shall govern your deliberations:
>
> 'This defendant as are all defendants in criminal cases is presumed to be innocent, and this presumption of innocence stays with defendant throughout the trial, and until you, the members of the Jury, reach a verdict. The failure of the defendant to take the witness stand and testify in his own behalf does not create any presumption against him, and you are charged that you must not permit the fact that he failed to take the stand to weigh in the slightest degree against the defendant, nor shall this fact enter into the discussions or deliberations of the jury in any manner'
>
> 'I do charge you, however, that in your deliberations you shall decide the case upon all of the

evidence before you offered by the State and by the defendant, and all of the facts and circumstances in reaching your ultimate determinations in deciding the defendant's innocence or guilt, you are to consider all of the instructions as I have previously given them to you, except as modified by this charge in your deliberations'." (D326a-16 to D327a-22).

A verdict of guilty was returned at 5:00 P.M.

REASONS WHY WRIT OF CERTIORARI SHOULD NOT BE GRANTED

POINT I

The decision of the Supreme Court of New Jersey complies fully with the rule of *Griffin* v. *California* and neither modifies nor misinterprets existing federal constitutional law.

Defendant asserts in his petition that the Supreme Court of New Jersey "has circumvented the *Griffin* [*Griffin* v. *California*, 380 U. S. 609 (1965)] decision by avoiding the facts of this case and by refusing to accept the constitutional command of that case." With respect to the "command" of *Griffin*, it is beyond question that the Supreme Court of New Jersey has held consistently that that case serves to bar comment upon a defendant's failure and also comment which permits an inference that a defendant cannot deny inculpatory facts he could meet by his own oath. *State* v. *Fiorvanti*, 46 N. J. 109, 115 (1965). See also *State* v. *Lanzo*, 44 N. J. 560 (1965); *State* v. *Aviles*, 45 N. J. 152 (1965); *State* v. *Davis*, 45 N. J. 195 (1965). As was true in the above-mentioned cases, the Supreme

Court of New Jersey acknowledged the *Griffin* rule in its per curiam opinion in the case *sub judice* (P8a).

Contrary to the suggestion of the defendant, the instant facts were not avoided by the highest court of New Jersey. As is seen from the "Counter-Statement of the Case," *supra,* defendant did everything in his power to make his failure to take the stand a conspicuous matter. Time after time he attempted to testify to the jury through the guise of questioning witnesses. Although he was frequently advised that unsworn testimony was not permitted, he continued on his self-appointed course of action. The Supreme Court demonstrated an acute awareness of the facts of this case when it noted, "the jury's attention was inevitably focused on defendant's right and failure to testify, and this because of defendant's decision to try the case and to try it his way" (P10a). The State was entitled to an instruction from the bench that testimony of the sort being offered by the defendant must be disregarded. *Smith* v. *United States,* 234 F. 2d 385, 388 (5 Cir. 1956). Moreover, the defendant's conduct warranted a fair response calling attention to his failure to take the stand. *Redfield* v. *United States,* 315 F. 2d 76 (9 Cir. 1963).

The case of *United States* v. *Curtiss,* 330 F. 2d 278 (2 Cir. 1964), claimed by defendant to be in conflict with *Redfield,* is not necessarily so. *Curtiss* involved comment upon the failure of the accused to take the stand which was prompted by certain non-evidentiary remarks made by him during his summation to the jury. The Second Circuit held that the defendant did not waive his Fifth Amendment rights by electing to sum up to the jury. *Redfield,* on the other hand, involved a defendant who, like the present defendant, persistently testified while purportedly acting in the role of counsel. It is interesting to note that the majority opinion in *Curtiss* does not mention *Redfield,* a fact which may be of significance on the general question of whether the two cases are in conflict.

There is an additional element present here that was not present in either *Redfield* or *Curtiss, supra.* This defendant sought to explain his failure to take the stand to the jury during his summation. As the Supreme Court of New Jersey indicated, the defendant asked, ". . . have I taken the stand? I could have done nothing but say the facts are true the intent is gone and there is no intent. What else could I say? What else could I explain?" (P10a, P11a). In *United States* v. *Feinberg,* 140 F. 2d 592, 595 (2 Cir. 1944), a statement by counsel as to what his client would have said on the stand was held to justify comment by the prosecutor upon the failure to testify. In the present case, the challenged comment related to the ability of the defendant to deny certain facts. Since he admitted to the jury that he could not deny the facts, it is impossible to see how he was harmed. The Supreme Court of New Jersey recognized that the comment went no further than defendant's own admission in summation. The court, therefore, found it unnecessary to pass upon the question of whether erroneous comment warrants reversal even in the absence of a showing of harm.

The decision of the Supreme Court of New Jersey did not determine any heretofore unanswered federal questions, nor did it decide questions in a manner which may be inconsistent with decisional law of this Court. The *Griffin* case was not in issue. There can be no quarrel with the mandate of that case, and, indeed, none was attempted here. The affirmance of defendant's conviction for business frauds was premised upon the particular facts present, which facts make it abundantly clear that the defendant was attempting to evoke the protection afforded to those who would remain silent while at the same time offering testimony while not under oath. The Constitution has never been so one-sided in its scope nor so unyielding in its application.

POINT II

The present case is not an appropriate one for the issuance of a writ of certiorari because there was a supplemental charge offered by the court which withdrew the earlier comment regarding the failure to testify and replaced it with one which equalled and may have surpassed constitutional requirements.

Although the decision of the court below appears justified on the independent grounds already discussed, it should be pointed out (and was in the decision of the New Jersey Supreme Court) that the trial court recharged the jury in accordance with the case of *Malloy* v. *Hogan,* 378 U. S. 1 (1964). As it happened, the jury in this case had originally been charged under the then existing rule of *State* v. *Corby,* 28 N. J. 106 (1958). That rule permitted comment on the failure of the accused to deny facts in evidence. While the jury was deliberating, the *Malloy* case was reported in the *New York Times,* and the assistant prosecutor who was trying the case asked the court to recall the jury and offer a superseding charge. This was done, and the jury was admonished that it could draw no inference from the failure of the accused to take the stand in his own behalf. The supplemental instruction certainly equally and may have gone beyond what was to become applicable federal doctrine expressed in *Griffin.*

In any event, the jury found the defendant guilty on all but 3 of the 70 counts which were before it for consideration. This fact alone suggests the presence of a jury which was not inclined to have been influenced towards a blanket verdict of guilty because of the earlier instruction regarding failure to testify.

POINT III

Defendant's claims that he was the victim of an unlawful search and seizure and that he was improperly denied immunity from prosecution are totally unsupported by the facts.

There are no genuine federal questions presented with respect to the Fourth Amendment's protection from unreasonable searches and seizures or the Fifth Amendment's relationship to a New Jersey immunity statute. The defendant would have this Court believe that he was the victim of constitutional deprivations relating to each of the above amendments. Under N.J.S.A. 49:3-16(d), a person must testify and produce his records pursuant to subpoena, but if he does so after claiming his privilege against self-incrimination he may not be prosecuted wth respect to the transaction to which testimony or records relate.

The defendant here was not subpoenaed to produce any records. But he claims the custodian of the corporate and partnership records produced some of his personal records in response to the subpoena served upon said custodian. The Supreme Court noted that defendant never identified the records in his appeal brief and that he had referred the court to some 180 exhibits after argument. The court found those exhibits inconclusive. Most significantly, the Supreme Court found that the claim of privilege had never been made to the Bureau of Securities at the time the records were handed over. There was therefore, no basis for the claim of immunity.

With respect to the Fourth Amendment, it must be pointed out that there was no search or seizure—there was a subpoena. The representative of the corporation and

limited partnerships complied with the subpoena without protest. Defendant protests that the Supreme Court "completely ignored the issue, passing it off with one sentence . . . (P11a)". Aside from protest, defendant offers no facts to support his claim that he was the victim of an unlawful search.

CONCLUSION

For the reasons contained herein, it is respectfully urged that this Court deny defendant's petition for a writ of certiorari to the Supreme Court of New Jersey.

Respectfully submitted,

BRENDAN T. BYRNE,
County Prosecutor of Essex County,
New Jersey,
Attorney for Respondent.

BARRY H. EVENCHICK,
Assistant County Prosecutor,
Of Counsel and on the Brief.